

United States District Court  
Central District of California

ROBERT HIRSCH and CINDY  
HIRSCH,

Case No. 2:18-cv-08371-ODW (AGRx)

## Plaintiffs,

V.

STEPHEN W. HARGETT,  
CHRISTOPHER P. HARGETT, JOHN  
E. HARGETT AND 678 KIRK LLC

## **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [36]**

## Defendants

## I INTRODUCTION

This action centers on the refusal of Defendants Stephen W. Hargett, Christopher P. Hargett, John E. Hargett (collectively, “Hargett Defendants”), and 678 Kirk, LLC (“678 Kirk”) to allow Plaintiffs Robert Hirsch and Cindy Hirsch (collectively, “Plaintiffs”) additional time to remove their possessions from their apartment following their eviction. (Third Am. Compl. (“TAC”) ¶ 47, ECF No. 35.) Plaintiffs also assert that Hargett Defendants exerted undue influence over Jeannine Davis-Kimball, former owner of Plaintiffs’ apartment complex and Hargett Defendants’ mother, to take control of Ms. Davis-Kimball’s trust assets and falsely and fraudulently evict Plaintiffs. (TAC ¶¶ 22, 32, 35.) Hargett Defendants and

1 Defendant 678 Kirk (collectively, “Defendants”) move to dismiss Plaintiffs’ TAC on  
2 several grounds including failure to state a claim and lack of subject matter  
3 jurisdiction. (Mot. to Dismiss (“Mot.”), ECF No. 36.) For the reasons that follow, the  
4 Court **GRANTS** Defendants’ Motion.<sup>1</sup>

5 **II. BACKGROUND**

6 **A. FACTUAL BACKGROUND**

7 Ms. Davis-Kimball, now deceased, was the sole owner and manager of 678  
8 Kirk, which owned the apartment complex where Plaintiffs previously resided. (TAC  
9 ¶ 22.) Ms. Davis-Kimball, together with her spouse, Warren Matthew, were the  
10 settlor-trustees of the Matthew-Davis-Kimball Trust (“Trust”). (TAC ¶ 16.) Ms.  
11 Davis-Kimball amended the Trust in June 2016 to name Mr. Hirsch as successor-  
12 trustee in lieu of Stephen Hargett. (TAC ¶ 17.) The amendment provided for  
13 \$300,000 to Mr. Hirsch as trustee and modified the terms of the Hirschs’ rental  
14 agreement. (TAC ¶¶ 19, 83.) Plaintiffs allege that Hargett Defendants exerted undue  
15 influence over Ms. Davis-Kimball to obtain further amendments to the Trust so they  
16 could take control of the trust assets upon Ms. Davis-Kimball’s death in April 2017.  
17 (TAC ¶¶ 22, 29, 32.)

18 In July 2017, 678 Kirk commenced an unlawful detainer action against Mr. and  
19 Ms. Hirsch in the Superior Court of the State of California, County of Ventura. (TAC  
20 ¶ 35.) After a trial on October 26, 2017, in which both parties were represented by  
21 counsel, the superior court issued judgment in favor of 678 Kirk and against Mr. and  
22 Ms. Hirsch on November 15, 2017.<sup>2</sup> (See TAC ¶¶ 39–40; Jones Decl. ¶¶ 2–4, Ex. B  
23 (“Eviction Judgment”).) Defendants informed Plaintiffs they could remove their  
24 possessions from the apartment on November 20, 2017, between 10:00 a.m. and  
25 4:00 p.m., and that any possessions remaining on the premises after that time would

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27 <sup>1</sup> After carefully considering the papers filed in connection with the Motion, the Court deemed the  
matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

28 <sup>2</sup> Plaintiffs did not appeal the Eviction Judgment, and the time for appeal has expired. (See Decl. of  
Greg W. Jones (“Jones Decl.”) ¶ 5, ECF No. 36-1.)

1 be removed to storage the following day. (TAC ¶¶ 42, 44.) On November 20, 2017,  
2 at approximately 2:45 p.m., Mr. Hirsch informed Defendants that Plaintiffs required  
3 more time to remove their possessions due to his physical disability. (TAC ¶¶ 44, 46.)  
4 Defendants refused the request for more time. (TAC ¶ 47.)

5 Through their TAC, Plaintiffs assert seven causes of action. Plaintiffs allege  
6 that Defendants refused to reasonably accommodate Mr. Hirsch's request for  
7 additional time to remove their possessions from the apartment, in violation of (1) the  
8 Fair Housing Amendments Act ("FHAA"); (2) 42 U.S.C. § 1983; (3) California  
9 Disabled Persons Act ("CDPA"); and (4) California Unruh Civil Rights Act.<sup>3</sup> (TAC  
10 ¶¶ 50–75.) Plaintiffs also allege that Hargett Defendants exerted undue influence over  
11 Ms. Davis-Kimball to obtain the Trust amendments and evict Plaintiffs. (*See, e.g.*,  
12 TAC ¶¶ 29, 32, 35.) These allegations relate to Plaintiffs' claims for (5) Breach of  
13 Fiduciary Trust and Trust Fraud; (6) Breach of Contract; and (7) Elder Abuse. (TAC  
14 ¶¶ 76–118.) Plaintiffs allege federal question, diversity, and supplemental subject  
15 matter jurisdiction pursuant to 42 U.S.C. §§ 1331, 1332, and 1367. (TAC ¶¶ 11–13.)

16 **B. PROCEDURAL BACKGROUND**

17 On February 26, 2018, Plaintiffs initiated this action in the United States  
18 District Court, District of Arizona, asserting causes of action under the American with  
19 Disabilities Act ("ADA"), 42 U.S.C. § 1983, Breach of Contract, Breach of Fiduciary  
20 Duty and Trust Fraud, and Elder Abuse. (*See generally* Compl., ECF No. 1.) After  
21 screening Plaintiffs' Complaint, the district court of Arizona found that Plaintiffs  
22 failed to state a claim and dismissed Plaintiffs' Complaint without prejudice and with  
23 leave to amend. (Order 1, 3, ECF No. 7.) Plaintiffs subsequently amended their  
24 complaint twice, asserting the same causes of action. (*See* Am. Compl., ECF No. 8;  
25 Second Am. Compl. ("SAC"), ECF No. 9.) Defendants moved to dismiss Plaintiffs'

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<sup>3</sup> Plaintiffs do not oppose dismissal of the fourth cause of action for violation of the Unruh Civil  
28 Rights Act. (Opp'n to Mot. ("Opp'n") 2, ECF No. 44.) Accordingly, the Court **GRANTS**  
Defendants' Motion as to Plaintiffs' fourth cause of action.

1 SAC or transfer the action to this Court. (Mot. to Dismiss or Transfer, ECF No. 14.)  
2 The district court of Arizona granted the transfer but did not reach the merits of  
3 Defendants' motion. (Order, ECF No. 20.) Following the transfer to this Court,  
4 Defendants again moved to dismiss Plaintiffs' SAC. (Mot. to Dismiss SAC, ECF  
5 No. 32.) However, the Court, *sua sponte*, found that Plaintiffs failed to sufficiently  
6 allege federal jurisdiction and dismissed the SAC with leave to amend. (Order  
7 Dismissing SAC 1–2, ECF No. 34.) Accordingly, the Court denied Defendants'  
8 motion as moot.

9 Defendants now move to dismiss Plaintiffs' subsequently-filed TAC on several  
10 grounds, including that Plaintiffs fail to state a claim and the Court lacks subject  
11 matter jurisdiction. (Mot. 2–3.) Plaintiffs oppose.<sup>4</sup> (*See generally* Opp'n.)

### 12 III. LEGAL STANDARDS

#### 13 C. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

14 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant may  
15 move to dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P.  
16 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*  
17 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d  
18 1214, 1242 (9th Cir. 2000)). A facial attack is based on the challenger’s assertion that  
19 allegations in the complaint are “insufficient on their face to invoke federal  
20 jurisdiction.” *Id.* A factual attack disputes the validity of allegations that, if true,  
21 would invoke federal jurisdiction. *Id.* In resolving a factual attack, the court “need

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23 <sup>4</sup> Ms. Hirsch did not oppose Defendants' Motion. Mr. Hirsch filed “Plaintiff’s Opposition” and  
24 submitted his declaration in support thereof; he is the sole signatory to both documents. (*See*  
25 Opp'n 20; Decl. of Robert Hirsch (“Hirsch Decl.”) 17, ECF No. 45.) The Court has received  
26 nothing to indicate that Ms. Hirsch joins Mr. Hirsch’s Opposition. Although a non-attorney may  
27 “appear in propria persona in his own behalf, that privilege is personal to him.” *McShane v. United*  
28 *States*, 366 F.2d 286, 288 (9th Cir. 1966) (citation omitted). Mr. Hirsch has no authority to  
prosecute a civil lawsuit on behalf of anyone other than himself. *See C.E. Pope Equity Tr. v. United*  
States, 818 F.2d 696, 697 (9th Cir. 1987). Accordingly, the Court may grant Defendants' Motion as  
to Ms. Hirsch as unopposed. *See* C.D. Cal. L.R. 7-12. However, in light of Ms. Hirsch’s *pro se*  
status, the Court construes Mr. Hirsch’s Opposition as applying to Ms. Hirsch.

1 not presume the truthfulness of the plaintiffs' allegations." *White*, 227 F.3d at 1242.  
2 Once a defendant moves to dismiss for lack of subject matter jurisdiction, the plaintiff  
3 bears the burden of establishing the court's subject matter jurisdiction. *See Kokkonen*  
4 *v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Chandler v. State Farm Mut.*  
5 *Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). To sustain federal jurisdiction, a  
6 complaint must allege a claim under the Constitution or relevant federal statute and  
7 must not be made solely to obtain federal jurisdiction. *Bell v. Hood*, 327 U.S. 678,  
8 682–83 (1946).

9 **D. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

10 Dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal  
11 theory or the absence of sufficient facts alleged under a cognizable legal theory."  
12 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). "To survive a  
13 motion to dismiss . . . under Rule 12(b)(6), a complaint generally must satisfy only the  
14 minimal notice pleading requirements of Rule 8(a)(2)"—a short and plain statement of  
15 the claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); *see also* Fed. R. Civ. P.  
16 8(a)(2). The "[f]actual allegations must be enough to raise a right to relief above the  
17 speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The  
18 "complaint must contain sufficient factual matter, accepted as true, to state a claim to  
19 relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
20 (internal quotation marks omitted). "A pleading that offers 'labels and conclusions' or  
21 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (citing  
22 *Twombly*, 550 U.S. at 555).

23 Whether a complaint satisfies the plausibility standard is "a context-specific  
24 task that requires the reviewing court to draw on its judicial experience and common  
25 sense." *Id.* at 679. A court is generally limited to the pleadings and must construe  
26 "[a]ll factual allegations set forth in the complaint . . . as true and . . . in the light most  
27 favorable to [the plaintiff]." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.  
28 2001). However, a court need not blindly accept conclusory allegations, unwarranted

1 deductions of fact, and unreasonable inferences. *Sprewell v. Golden State Warriors*,  
2 266 F.3d 979, 988 (9th Cir. 2001). Accusations of fraud require a plaintiff to plead  
3 with particularity the circumstances constituting fraud. *See Fed. R. Civ. P. 9(b)*. Rule  
4 9(b) requires that the complaint identify the “who, what, when, where, and how” of  
5 the fraudulent activity, “as well as what is false or misleading about” it, and why it is  
6 false. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047,  
7 1055 (9th Cir. 2011) (internal quotation marks omitted).

8 Pro se pleadings are to be construed liberally, but a plaintiff must still present  
9 factual allegations sufficient to state a plausible claim for relief. *See Hebbe v. Pliler*,  
10 627 F.3d 338, 341–42 (9th Cir. 2010). A court may not “supply essential elements of  
11 the claim that were not initially pled.” *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.  
12 1992) (“Vague and conclusory allegations of official participation in civil rights  
13 violations are not sufficient to withstand a motion to dismiss.”). A liberal reading  
14 cannot cure the absence of such facts. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673  
15 F.2d 266, 268 (9th Cir. 1982).

16 **E. LEAVE TO AMEND**

17 Where a district court grants a motion to dismiss, it should generally provide  
18 leave to amend unless it is clear the complaint could not be saved by any amendment.  
19 *See Fed. R. Civ. P. 15(a); Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d  
20 1025, 1031 (9th Cir. 2008). Leave to amend may be denied when “the court  
21 determines that the allegation of other facts consistent with the challenged pleading  
22 could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture*  
23 Co., 806 F.2d 1393, 1401 (9th Cir. 1986); *see Lopez v. Smith*, 203 F.3d 1122, 1127  
24 (9th Cir. 2000). Thus, leave to amend “is properly denied . . . if amendment would be  
25 futile.” *Carrico v. City and Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir.  
26 2011).

## IV. DISCUSSION

Defendants move to dismiss Plaintiffs' TAC on several grounds, including failure to state a claim and lack of subject matter jurisdiction. As the Court finds these grounds dispositive, it does not reach Defendants' remaining arguments.

## A. PRO SE PLEADINGS

As a preliminary matter, Defendants argue the Court should not construe Plaintiffs' TAC liberally because Mr. Hirsch is a disbarred former attorney. (Mot. 4–5.) Mr. Hirsch has not practiced law for more than twenty-four years, and Plaintiffs have proceeded pro se throughout this litigation. (Hirsch Decl. ¶ 1.) The relevant inquiry is Plaintiffs' current pro se status, and as such, the Court construes Plaintiffs' TAC liberally, as the Supreme Court directs. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A document filed *pro se* is ‘to be liberally construed.’”).<sup>5</sup>

## **B. CLAIMS ARISING UNDER FEDERAL LAW**

Defendants move to dismiss Plaintiffs' first three claims, violation of (1) FHAA, (2) § 1983, and (3) CDPA, on the grounds that Plaintiffs fail to state a claim. Plaintiffs' first two claims are Plaintiffs' only claims arising under federal law. However, the reasonable accommodation provision of the CDPA is substantially similar to that of the FHAA and is analyzed in the same way. *See Sabi v. Sterling*, 183 Cal. App. 4th 916, 943 (2010) ("[California Civil Code section 54.1(b)(3)(B)] is largely identical to [the] one found in [42 U.S.C. § 3604]."). Accordingly, the Court

<sup>5</sup> The Court notes, however, that Plaintiffs’ procedural conduct borders on abusing the Court’s leniency. The Court granted Plaintiffs thirty days to amend their SAC, yet Plaintiffs filed their TAC after thirty-two. The Court granted the parties’ stipulation to allow Plaintiffs additional time to oppose Defendants’ Motion, yet Plaintiffs filed their Opposition days beyond their own requested deadline. Further, Mr. Hirsch filed a seventeen-page declaration expounding on his legal arguments, effectively circumventing the Court’s page limit for opposition papers. Despite this, the Court considers the opposition and declaration on the merits and in full, to the extent permissible on a 12(b)(1) or 12(b)(6) motion. As the late filing and additional pages prejudiced Defendants’ opportunity to fully respond, the Court also considers the entirety of Defendants’ Reply, despite exceeding the twelve-page limit, to mitigate the prejudice to Defendants.

1 analyzes Plaintiffs' FHAA and CDPA claims together before turning to Plaintiffs'  
2 § 1983 claim.

3 ***1. Fair Housing Act and California Disabled Persons Act***

4 Defendants move to dismiss Plaintiffs' FHAA and CDPA claims on the  
5 grounds that Plaintiffs' only basis for discrimination came after Plaintiffs no longer  
6 had a legal right to use or enjoy the dwelling. (Mot. 5-7.)

7 The FHAA makes it unlawful to "discriminate in the sale or rental . . . [of] a  
8 dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). It is  
9 unlawful to "discriminate against any person in the terms, conditions, or privileges of  
10 sale or rental of a dwelling, or in the provision of services or facilities in connection  
11 with such dwelling, because of a handicap." *Id.* § 3604(f)(2). Discrimination may be  
12 shown through disparate treatment, disparate impact, or "a refusal to make reasonable  
13 accommodations in rules, policies, practices, or services, when such accommodations  
14 may be necessary to afford such person equal opportunity to use and enjoy a  
15 dwelling." *Id.* § 3604(f)(3)(B); *see also* 24 C.F.R. § 100.204 (defining reasonable  
16 accommodations);<sup>6</sup> *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir.  
17 1997). "The reasonable accommodation inquiry is highly fact-specific, requiring  
18 case-by-case determination." *United States v. Cal. Mobile Home Park Mgmt. Co.*,  
19 107 F.3d 1374, 1380 (9th Cir. 1997).

20 The Ninth Circuit has articulated that,

21 To prevail on a claim under 42 U.S.C. § 3604(f)(3), a plaintiff must  
22 prove all of the following elements: (1) that the plaintiff or his associate  
23 is handicapped within the meaning of 42 U.S.C. § 3602(h); (2) that the  
24 defendant knew or should reasonably be expected to know of the  
25 handicap; (3) that accommodation of the handicap may be necessary to  
afford the handicapped person an equal opportunity to use and enjoy the

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27 <sup>6</sup> The CDPA similarly requires that "[a] person renting, leasing, or otherwise providing real property  
28 for compensation shall not refuse to make reasonable accommodations in rules, policies, practices,  
or services, when those accommodations may be necessary to afford individuals with a disability  
equal opportunity to use and enjoy the premises." Cal. Civ. Code § 54.1(b)(3)(B).

1 dwelling; (4) that the accommodation is reasonable; and (5) that  
2 defendant refused to make the requested accommodation.

3 *Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th  
4 Cir. 2006) (citing 42 U.S.C. § 3604(f)(3)(B); *Cal. Mobile Home*, 107 F.3d at 1380).  
5 “To prove that an accommodation is necessary, plaintiffs must show that, but for the  
6 accommodation, they likely will be denied an equal opportunity *to enjoy the housing*  
7 *of their choice.*” *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003)  
8 (emphasis added and internal quotation marks omitted); *see also S. Cal. Hous. Rights*  
9 *Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1066 (C.D. Cal.  
10 2005).

11 The FHAA’s reasonable accommodation provision does not encompass  
12 Plaintiffs’ request for additional time to move out *after their eviction*. To begin, the  
13 FHAA prohibits disability-related discrimination against actual or prospective buyers  
14 or renters and their associates. But Plaintiffs were not actual or prospective buyers or  
15 renters; they were *former* renters, subject to a state court eviction judgment. Further,  
16 Plaintiffs’ request for an extension of time was not in pursuit of inhabiting the housing  
17 of their choice, but rather in vacating that housing. Moreover, the request came after  
18 they had been legally evicted and were no longer entitled to use of the dwelling. A  
19 discriminatory denial under the FHAA can occur at any time during the entire period  
20 *before* a tenant is actually evicted. *Cf. Comm. Concerning Cnty. Improvement v. City*  
21 *of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) (recognizing FHA claims based on  
22 discrimination at the time of and after *acquisition* of the housing); *Radecki v. Joura*,  
23 114 F.3d 115, 116 (8th Cir. 1997) (relying on 42 U.S.C. § 3604(f)(1)(A) and focusing  
24 the inquiry on the timeframe before the plaintiff was actually evicted).

25 Plaintiffs were actually evicted on November 15, 2017. (TAC ¶ 40.) Five days  
26 later, on November 20, 2017, Mr. Hirsch requested an extension of time to remove  
27 Plaintiffs’ possessions. (TAC ¶ 46.) Although individuals with disabilities are to be  
28 granted accommodations necessary to afford them equal opportunity to use and enjoy

1 a dwelling, no provision of the FHAA entitles an individual to use and enjoy a  
2 dwelling in which the individual has no potentially valid basis to live.<sup>7</sup>

3 Accordingly, even construing Plaintiffs' TAC liberally, Plaintiffs' FHAA and  
4 CSPA claims fail. As Plaintiffs can allege no facts consistent with the TAC that  
5 would remedy this deficiency and have previously amended three times, including  
6 with the benefit of Defendants' arguments for dismissal, the Court finds further  
7 amendment would be futile. Accordingly, the Court **GRANTS** Defendants' Motion  
8 as to Plaintiffs' first and third claims **WITHOUT LEAVE TO AMEND**.

9 **2. 42 U.S.C. § 1983**

10 Plaintiffs allege that Defendants violated their rights under 42 U.S.C. § 1983 by  
11 filing an unlawful detainer action against them and by refusing to reasonably  
12 accommodate Mr. Hirsch's disability with additional time to remove Plaintiffs'  
13 possessions from the apartment following the eviction. (TAC ¶¶ 49, 59–64.)

14 To state a claim under § 1983, Plaintiffs must show that Defendants acted under  
15 color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). “Action  
16 taken by private individuals may be ‘under color of state law’ where there is  
17 ‘significant’ state involvement in the action.” *Howerton v. Gabica*, 708 F.2d 380, 382  
18 (9th Cir. 1983). Conversely, “[p]rivate misuse of a state statute does not describe  
19 conduct that can be attributed to the state.” *Lugar v. Edmondson Oil Co.*, 457 U.S.  
20 922, 941–42 (1982); *see also Howerton*, 708 F.2d at 384 (“[A] private repossession  
21 pursuant to a state statutory provision is not state action.”). Courts must examine the  
22 totality of circumstances surrounding a private eviction to determine whether the  
23 defendants acted under color of state law. *Howerton*, 708 F.2d at 384.

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25 <sup>7</sup> Plaintiffs argue for the first time in their Opposition that Defendants’ “discrimination against  
26 [P]laintiff[s] is evidenced by the widely disparate treatment [to which they were] subject.”  
27 (Opp’n 9.) However, Plaintiffs' TAC contains no disparate treatment allegations. (See generally  
28 TAC.) Regardless, Plaintiffs cannot state a prima facie case for disparate treatment for the same  
reasons as discussed above: they were not entitled to use of the dwelling after eviction. *See Gamble*,  
104 F.3d at 305 (applying *McDonnell Douglas* burden-shifting analysis to FHA disparate treatment  
claims, requiring a plaintiff to first plead a prima facie case).

1       Here, Plaintiffs allege no facts suggesting significant state involvement in the  
2 filing of the unlawful detainer action, eviction, or management of the removal of  
3 Plaintiffs' possessions from the apartment. The mere filing of the unlawful detainer  
4 action, alone, cannot be attributed to the state. *See Lugar*, 457 U.S. at 941. Plaintiffs  
5 do not allege that Defendants participated in joint action with state actors to effectuate  
6 the eviction, and they name no state officials or agents as defendants in their TAC. As  
7 part of their breach of contract claims, Plaintiffs allege that they were evicted from  
8 their apartment by the Sheriff of Ventura County, (TAC ¶ 103), but this single,  
9 conclusory allegation does not rise to the level of "significant state involvement." *See*  
10 *Howerton*, 708 F.2d at 384 ("A single request for the police to perform their peace-  
11 keeping functions may not be sufficient to make a landlord a 'joint actor' with the  
12 state for section 1983 purposes.").

13       Further, Plaintiffs do not allege any state involvement in Defendants' refusal to  
14 give Plaintiffs more time to remove their possessions before Defendants put them in  
15 storage. Plaintiffs allege that only Defendants and their agents and employees were  
16 present on November 20, 2017, and that only Defendants refused Mr. Hirsch's  
17 request. (*See* TAC ¶¶ 44–49, 59–64.) That a state statute authorizes Defendants to  
18 store Plaintiffs' possessions after eviction does not make Defendants' decision to do  
19 so state action. *See Flagg Bros.*, 436 U.S. at 165–66; *see also Melara v. Kennedy*, 541  
20 F.2d 802, 808 (9th Cir. 1976) (holding that action taken pursuant to a non-mandatory  
21 statutory scheme is not state action).

22       In short, Plaintiffs do not allege state action. Accordingly, even construing  
23 Plaintiffs' TAC liberally, it fails to state a claim under § 1983. As noted, Plaintiffs  
24 have amended their complaint three times, including with the benefit of Defendants'  
25 arguments for dismissal. Plaintiffs can allege no set of facts consistent with the TAC  
26 that would remedy the deficiency in their § 1983 claim. As such, further amendment  
27 would be futile. Accordingly, the Court **GRANTS** Defendants' Motion as to  
28 Plaintiffs' second claim **WITHOUT LEAVE TO AMEND**.

1      **C. DIVERSITY JURISDICTION**

2      Defendants move to dismiss Plaintiffs' TAC on the grounds that Plaintiffs fail  
3 to sufficiently allege diversity jurisdiction. The Supreme Court "ha[s] consistently  
4 interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs  
5 and multiple defendants, the presence in the action of a single plaintiff from the same  
6 State as a single defendant deprives the district court of original diversity jurisdiction  
7 over the entire action." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546,  
8 553 (2005). For diversity purposes, an individual is a citizen of the state where he or  
9 she is domiciled. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001).  
10 A person's domicile is her permanent home, where she resides with the intention to  
11 remain or to which she intends to return. *Id.* (citing *Lew v. Moss*, 797 F.2d 747, 749  
12 (9th Cir. 1986)). "[A] limited liability company is a citizen of every state of which its  
13 owners/members are citizens." *3123 SMB LLC v. Horn*, 880 F.3d 461, 465 (9th Cir.  
14 2018) (quoting *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th  
15 Cir. 2006)).

16      The Court previously dismissed Plaintiffs' SAC for lack of subject matter  
17 jurisdiction and provided guidance to Plaintiffs on the requirements for pleading  
18 diversity jurisdiction. (Order Dismissing SAC 4–5.) Despite the Court's previous  
19 guidance, Plaintiffs again fail to allege any Defendant's citizenship or domicile.  
20 Plaintiffs allege that they are domiciled in Phoenix, Arizona, so they recognize the  
21 distinction between domicile and residence. (TAC ¶¶ 4–5.) But Plaintiffs again  
22 merely allege that Hargett Defendants are residents of California. (TAC ¶¶ 7–9.)  
23 Even were the Court to construe Plaintiffs' allegations of residence as citizenship or  
24 domicile, Plaintiffs also again fail to sufficiently allege the citizenship of Defendant  
25 678 Kirk. As in Plaintiffs' SAC, and despite the Court's directive to allege the  
26 identity and citizenship of Defendant 678 Kirk's owners or members, Plaintiffs allege  
27 only that 678 Kirk is organized under the laws of California with its principal place of  
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1 business in California, and that Ms. Davis-Kimball was its former owner. (TAC  
2 ¶ 10.)

3 What is more, Defendants move to dismiss Plaintiffs' state law claims (counts  
4 three through seven) on the grounds that Plaintiffs fail to sufficiently allege diversity.  
5 (Mot. 10–11.) Plaintiffs do not oppose Defendants' Motion on this issue. (See  
6 generally Opp'n; Reply 10, ECF No. 48.) Accordingly, the Court accepts Plaintiffs'  
7 failure to oppose as waiver or abandonment of diversity jurisdiction. *See Heraldez v.*  
8 *Bayview Loan Servicing, LLC*, No. CV 16-1978-R, 2016 WL 10834101, at \*2 (C.D.  
9 Cal. Dec. 15, 2016), *aff'd*, 719 F. App'x 663 (9th Cir. 2018) (citing *Stichting*  
10 *Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal.  
11 2011)) ("Failure to oppose constitutes a waiver or abandonment of the issue.").

12 As Plaintiffs again fail to sufficiently plead complete diversity, and do not  
13 oppose Defendants' Motion on the issue, the Court must conclude that it lacks  
14 diversity jurisdiction.

15 **D. SUPPLEMENTAL JURISDICTION**

16 When a federal court has dismissed all claims over which it has original  
17 jurisdiction, it may, at its discretion, decline to exercise supplemental jurisdiction over  
18 the remaining state law claims. 28 U.S.C. § 1337(c)(3); *Carlsbad Tech., Inc. v. HIF*  
19 *Bio, Inc.*, 556 U.S. 635, 640 (2009). “[I]n the usual case in which all federal-law  
20 claims are eliminated before trial, the balance of factors to be considered under the  
21 pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—  
22 will point toward declining to exercise jurisdiction over the remaining state law  
23 claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *see also*  
24 *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“Needless decisions  
25 of state law should be avoided both as a matter of comity and to promote justice  
26 between the parties, by procuring for them a surer-footed reading of applicable law.”);  
27 *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) (citing *San Pedro Hotel Co., Inc. v.*  
28

*City of Los Angeles*, 159 F.3d 470, 478 (9th Cir. 1998)) (holding that a district court is not required to provide an explanation when declining jurisdiction under § 1367(c)).

As discussed above, the Court dismisses Plaintiffs' federal claims. Further, Plaintiffs fail to adequately plead and abandon their claims of diversity jurisdiction. Thus, the Court has dismissed all claims over which it has original jurisdiction. As such, the Court declines to exercise supplemental jurisdiction over the remaining claims and **DISMISSES, WITHOUT PREJUDICE**, Plaintiffs' fifth, sixth, and seventh claims for breach of fiduciary trust and trust fraud, breach of contract, and elder abuse, respectively.

## V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Defendants' Motion **With Prejudice** as to Plaintiffs' first, second, third, and fourth claims, and **GRANTS** Defendants' Motion **Without Prejudice** as to Plaintiffs fifth, sixth, and seventh claims. (ECF No. 36.) The Court will issue Judgment.

## IT IS SO ORDERED.

June 26, 2019

**HON. OTIS D. WRIGHT, II  
UNITED STATES DISTRICT JUDGE**